86 1883

No.

Supreme Court, U.S.
FILED
MAY 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

TRIPLE "A" MACHINE SHOP, INC.,
Petitioner,

VS.

SOUTHWEST MARINE, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Petitioner won summary judgment below—thereby establishing that respondent's antitrust suit was meritless—but the Court of Appeals ordered petitioner to pay respondent's attorneys' fees anyway. Petitioner won summary judgment because, it was held, petitioner was merely exercising its First Amendment petition rights. Yet the Court of Appeals ordered petitioner to pay respondent's fees as the "price" for exercising those rights.

Of the seven judges who addressed respondent's audacious claim (a District Judge and six Circuit Judges), five of them believed the winner should *not* have to pay the loser's attorneys' fees. But petitioner must pay them nonetheless, merely because two panel members are holding fast to their error. That error—labeled a "substantial miscarriage of justice" by four Circuit Judges—stands as the only appellate decision in the entire 73-year history of the Clayton Act ever to address the question presented here, which is:

> Whether a Sherman Act defendant who prevails on the merits is nonetheless liable for plaintiff's attorneys' fees under the Clayton Act on the premise that plaintiff "substantially prevailed" by exacting favorable concessions from another defendant who settled.

THE PARTIES

Petitioner is Triple "A" Machine Shop, Inc. ("Triple A"). Respondent is Southwest Marine, Inc. ("Southwest").

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Triple "A" Machine Shop, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 5, 1986.

OPINIONS BELOW

The first opinion of the Court of Appeals is reported at 732 F.2d 744 (Appendix A hereto). The opinion of the District Court on remand, granting summary judgment for petitioner and denying respondent's request for attorneys' fees, is reported at 616 F.Supp. 253 (Appendix B hereto). The second opinion of the Court of Appeals, reversing the District Court's denial of attorneys' fees, is reported at 796 F.2d 291 (Appendix C hereto). The third opinion of the Court of Appeals, denying the petition for rehearing, is not reported (Appendix D hereto). The order of the Court of Appeals vacating the third opinion is not reported

(Appendix E hereto). The Court of Appeals' order amending its second opinion is reported at 806 F.2d 898 (Appendix F hereto). The final opinion of the Court of Appeals, denying rehearing, is reported at 811 F.2d 501 (Appendix G hereto).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 5, 1986. A timely petition for rehearing with suggestion for rehearing en banc was denied on February 25, 1987 (App. G). This petition is filed within 90 days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Clayton Act § 4 and § 16, 15 U.S.C. §§ 15 and 26, relevant excerpts of which are set forth in Appendix H.

STATEMENT OF THE CASE

A. Introduction

This antitrust case began almost ten years ago (CR 1) and was recently concluded when the District Court granted defendant/petitioner Triple A's motion for summary judgment on *Noerr-Pennington*[1] grounds and plaintiff/respondent Southwest declined to appeal (App. B). The only question now remaining is whether Triple A, having prevailed on the merits, should nonetheless be required to pay Southwest's attorneys' fees under 15 U.S.C. § 26 because Southwest had "prevailed" upon another defendant to give Southwest what it wanted in compromise of its claims against that defendant.

Southwest was engaged in the repair and maintenance of Navy ships in the Port of San Diego, California, as were defendants

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[1] *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

Campbell Industries, San Diego Marine Construction Corp., National Steel and Shipbuilding Co. ("NASSCO") and Triple A Machine Shop, Inc. ("Triple A"). Defendants were parties to a "Users' Agreement" with the San Diego Port District which granted each of them the right to use a dry dock facility in conducting ship repair work under specified conditions. Southwest applied to the Port District for a special waiver of the financial responsibility and experience requirements imposed by the Port District as a condition to the use of its facility. In response, the Port District held a public hearing and invited comments from defendants and other interested parties. Defendants (including Triple A) appeared before the Port District and expressed their objections to Southwest's request for dispensation from the Port District's requirements. Following the public hearing and the Port District's staff's investigation and recommendation against waiver, the directors of the Port District voted unanimously to disapprove Southwest's request (CR 299, 301). This antitrust suit followed.

B. Proceedings in the District Court

Defendants moved for summary judgment on *Noerr-Pennington* grounds (CR 11). Their motion was denied without opinion (CR 34). Southwest moved for a preliminary injunction. That motion was also denied (CR 34). Shortly thereafter, defendant NASSCO voluntarily acceded to Southwest's wishes by granting Southwest a partial assignment of its contract rights to use the dry dock (CR 299, 301). As a result, Southwest obtained what it wanted but without having to meet the Port District's financial responsibility and experience requirements which the others had to meet (CR 299, 301).[2]

The case was tried to a jury in November 1980. The jury, in a special verdict, found in defendants' favor (CR 260). The District Court entered judgment for defendants on the jury's special verdict (CR 271). Southwest requested attorneys' fees because of the concession it had previously exacted from NASSCO (CR 266). The court denied Southwest's request because, it believed,

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[2] Southwest later settled with NASSCO and dismissed it from the action (CR 302).

Southwest had not "prevailed" under 15 U.S.C. §§ 15 and 26 (CR 270, 271). Southwest appealed (CR 278).

C. The First Appeal

The Court of Appeals reversed the lower court's judgment with respect to liability and remanded to the District Court for consideration of defendants' motion for a new trial due to the improper admission of evidence and, if and when appropriate, for a trial of damages (App. A at 5). The appellate court also ruled that Southwest had "substantially prevailed" for attorneys' fee purposes when it previously gained access to the dry dock facility through defendant NASSCO's voluntary assignment of its contract rights to Southwest. Following remand, Triple A renewed its motion for summary judgment in reliance upon the *Noerr-Pennington* doctrine as recently interpreted by the Ninth Circuit in *In Re Airport Car Rental Antitrust Litigation,* 693 F.2d 84 (9th Cir. 1982). The District Court granted Triple A's motion for summary judgment and denied Southwest's request for attorneys' fees (App. B at 12-13). Southwest did not appeal the summary judgment but did appeal the denial of attorneys' fees.

D. The Present Appeal

Reversing, the Court of Appeals cited its previous holding that Southwest had "substantially prevailed" against Triple A when NASSCO voluntarily granted Southwest use of the dry dock through a partial assignment of NASSCO's contract rights (App. C). The lower court further declared that its previous decision "constituted a final and unconditional determination with respect to the attorney fee issue" and was therefore "law of the case" (App. C at 15). Circuit Judge Noonan at first concurred in deference to the law of the case, but with obvious reluctance. He recognized that "National [*not* Triple A] granted Southwest a partial assignment of its *own* rights" and that "Triple A was *no party* to this concession"; that "Southwest did not vindicate the antitrust laws"; and that "what it achieved [from NASSCO] was achieved through a mistake of law by NASSCO" (App. C at 16, 18; emphasis added). Judge Noonan therefore could not see how Southwest had "prevailed" against Triple A.

Triple A petitioned for rehearing en banc. It stressed that regardless of whether Southwest had prevailed against NASSCO, Southwest had not prevailed against Triple A and that recent Supreme Court authority dictated the denial of Southwest's claim for attorneys' fees against Triple A. Its petition was denied, but now Circuit Judge Noonan dissented. The panel majority (Circuit Judges Canby and Reinhardt) declared they were not governed by this Court's latest decisions on attorneys' fees, claiming they had nothing to do with Southwest's claim for attorneys' fees from a defendant who prevailed on the merits. It held the "law of the case"—not this Court's recent pronouncements—therefore applied. In his dissent, Judge Noonan declared the law of the case must yield to this Court's latest word on the subject: "A long line of precedent teaches that an appellate court should not be barred by the law of the case from correcting a decision which is ultimately seen to be mistaken because of an intervening treaty, statute, or relevant judicial decision. Rather, when the law changes, 'the law must be obeyed, or its obligation denied.' *The Peggy*, 1 Cranch 103, 110 (per Marshall, C.J.)" (App. D at 21-22). Judge Noonan thus concluded: "The contrary decision of this court is in accordance with the law of the case but it is contrary to law" (App. D at 22).

Four circuit judges—Noonan, Sneed, Goodwin and Anderson—dissented from the panel majority's denial of Triple A's petition for rehearing en banc. They were convinced that "[a] substantial miscarriage of justice is involved in this case" (App. G at 29).[3] Southwest now requests that Triple A pay more than $360,000 in attorneys' fees for prosecuting its meritless suit

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[3]The panel majority had vacated their earlier decision (App. E) only to reinstate it with a new footnote 2, which recited—without any evidence to support it—that the 1984 panel (consisting of two Circuit Judges who were not even on the 1986 panel) must have concluded that Triple A had joined NASSCO in granting Southwest access to the dry dock facility (App. E). However, this baffling addition of factual error to the panel majority's legal error did not escape the four dissenting judges' attention. They declared "The assignment made by National Steel & Shipbuilding Co. to Southwest Marine was not an assignment that was authorized, concurred in or in any way possible by Triple 'A'. There was

against Triple A. But the four dissenting Circuit Judges did not consider the *amount* of Southwest's claim to be what made it a "miscarriage of justice." As they explained:

> "Justice is too precious a commodity to have a price. Even if the ultimate fee awarded should be small, we should not so turn things on their head that the winner becomes the loser, nor, out of charity for the mistakes of this court, should we turn a blind eye when the court itself is the instrument of injustice" (App. G at 30).

REASONS WRIT SHOULD BE GRANTED

"In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 247 (1975). Nobody would quarrel with that statement of the law. But what authority or reason is there to reward the *losing* party with recovery of its attorneys' fees from the party who *prevailed*? That is what occurred here. Circuit Judge Noonan, at first reluctantly concurring but later vigorously dissenting from this grave injustice, put it well:

> "Most people if told you could bring a lawsuit, lose it, and then ask your opponent to pay you at least $363,000 in attorney's fees would think they had heard a joke or an extravagant parody of the mysterious ways of that old ass, the law. But that is exactly what Southwest Marine has done in this case. It lost at trial. It got a new trial and lost on summary judgment before the second trial began. It lost its

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no way that the defendants could 'collectively' permit Southwest Marine to use the facility" (App. G at 29-30). This led them to conclude:

> "For reasons that are not apparent, the court has been unwilling to acknowledge that the earlier panel committed an error of fact and it has been unwilling to rectify the miscarriage of justice based on the error of fact. Indeed, in footnote 2 of the present opinion, the court has chosen to repeat the original error. On this appeal Southwest Marine did not attempt to dispute Triple A's refutation of this mistake. The court nonetheless still seems to recite the error as fact" (App. G at 30).

> motion to amend its pleadings and start again. It has not appealed its defeat which has been mandated by the law. Nonetheless, Southwest has asked for attorney's fees, including fees for work on all the motions it has lost. Chutzpah takes on a new definition when one looks at Southwest's demands" (App. C at 15-16).

The panel majority's approval of such a travesty is directly contrary to at least four Supreme Court decisions—*Hanrahan v. Hampton,* 446 U.S. 754 (1980); *Ruckelshaus EPA v. Sierra Club,* 463 U.S. 680 (1983); *Supreme Court of Virginia v. Consumers Union, Etc.,* 446 U.S. 719 (1980); and *Kentucky v. Graham,* ____ U.S. ____, 105 S.Ct. 3099 (1985). It requires Triple A to pay attorneys' fees to Southwest as a price for exercising its First Amendment rights under *Noerr-Pennington.* And by subordinating clearly applicable Supreme Court authority to clearly erroneous "law of the case," compromising Triple A's constitutional rights in the process, it "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Supreme Court Rule 17(a).

I

THE LOWER COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *HANRAHAN* AND *RUCKELSHAUS*

In *Hanrahan v. Hampton,* 446 U.S. 754 (1980), the Court declared what it takes to be a "prevailing" party under the attorneys' fee provision of the Civil Rights Act, 42 U.S.C. § 1988, and Southwest utterly fails the test.[4] The District Court had there granted defendants' motion for directed verdict but the Court of Appeals reversed and remanded for trial. However, it also held that plaintiffs were entitled to a reasonable attorneys' fee for

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[4] 42 U.S.C. § 1988 standards apply here. The Court in *Hensley v. Eckerhart,* 461 U.S. 424, 433 n.7 (1983) declared that § 1988 standards "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' "

having "prevailed" on appeal. The Supreme Court reversed, holding that to secure reversal of a directed verdict—although obviously beneficial to plaintiff's claim—was not to "prevail" for attorneys' fee purposes. The Court recognized that a plaintiff "may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.' " *Hanrahan,* 446 U.S. at 756-57. But, the Court stressed, "it seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has *established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal.*" *Id.* at 757 (emphasis added).

Southwest never "established [its] entitlement to some relief on the merits" of its claim "either in the trial court or on appeal." Southwest lost its motion for a preliminary injunction. Southwest lost its first trial on the merits. Following reversal and remand, Southwest lost on Triple A's motion for summary judgment and chose not to appeal. This is not to "prevail" as "prevail" is defined by *Hanrahan.* Although defendant NASSCO voluntarily granted Southwest acess to the dry dock through a partial assignment of its contract rights, that is not enough to overcome the judgment entered against Southwest. *Hanrahan* acknowledges that a plaintiff may have "prevailed when [it] vindicate[s] rights through a consent judgment or without formally obtaining relief." *Id.* at 757. But this merely quotes the legislative history of a wholly different statute and, in any event, applies "only to a party who has established his *entitlement* to some relief on the merits of his claims." *Id.* Southwest did not do this. On the contrary, it is now *res judicata* that Southwest was *not* entitled to any relief under the antitrust laws.

The lower court's decision is also in direct conflict with the clarion ruling of this Court in *Ruckelshaus EPA v. Sierra Club,* 463 U.S. 680 (1983). The question there was, the Court declared, "whether it is 'appropriate,' within the meaning of § 307(f) of the Clean Air Act (42 U.S.C. § 7607(f)), to award attorney's fees to a party that achieved no success on the merits of its claims." 463 U.S. at 682. Its conclusion: that "some success on the merits be obtained" before attorneys' fees will be warranted. *Id.* While the

statute there construed was different—indeed more liberal—than §§ 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26), the Court's rationale is dispositive here: "English courts have awarded counsel fees to *successful* litigants for 750 years, see Alyeska, supra, at 247, n 18, 44 L Ed 2d 141, 95 S Ct 1612, but they have never gone so far as to force a vindicated defendant to pay the plaintiff's legal expenses." *Ruckelshaus,* 463 U.S. at 684-85 (emphasis in original). Speaking for the Court, Justice Rehnquist explained:

> "The uniform acceptance of this rule reflects, at least in part, intuitive notions of fairness to litigants. Put simply, *ordinary conceptions of just returns reject the idea that a party who wrongly charges someone with violations of the law should be able to force that defendant to pay the costs of the wholly unsuccessful suit against it.*" 463 U.S. at 685 (footnote omitted; emphasis added).

The lower court ignored *Hanrahan* and *Ruckelshaus,* apparently on the notion that any plaintiff who "prevails" upon a defendant to give him what he wants (be it money or some other commercial favor) in compromise of his meritless lawsuit has consequently also "prevailed" for purposes of entitling him to attorneys' fees. *Hanrahan* and *Ruckelshaus* have both plainly scotched that notion. Plaintiff in *Ruckelshaus* had a meritless claim but had nonetheless gotten defendant to abate certain actions voluntarily, just as here. Plaintiff contended this entitled it to attorneys' fees, quoting the Clean Air Act's legislative history: " 'The Courts should recognize that in bringing *legitimate actions* under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. *This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict.*' " 463 U.S. at 686 n.8.

This Court's reply there is dispositive here as well. *First*: "The approval of fee awards in 'legitimate' actions offers respondents little comfort: 'legitimate' means 'being exactly as proposed: neither spurious nor false,' which does not describe respondents' claims in this case." *Id.* Nor does it describe Southwest's claim here. *Second:* "Congress found it necessary to explicitly state that

the term appropriate [as used in the statute] *'extended'* to suits that forced defendants to abandon *illegal* conduct, although without a formal court order; this was no doubt viewed as a somewhat expansive innovation. . . ." *Id.* (emphasis added). Even so, declared the Court, "[w]e are unpersuaded by the argument that this same Congress was so sure that 'appropriate' also would extend to the far more novel, costly, and intuitively unsatisfying result of awarding fees to unsuccessful parties that it did not bother to mention the fact." *Id.* If "appropriate" under 42 U.S.C. § 7606(f) does not apply to a defendant's voluntary concession to plaintiff followed by plaintiff's ultimate loss on the merits, "prevail" under 15 U.S.C. §§ 15 and 26 can hardly be stretched any further.[5]

II

THE LOWER COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *KENTUCKY* AND *SUPREME COURT OF VIRGINIA*

But give Southwest the benefit of the doubt. Suppose that *Hanrahan* and *Ruckelshaus* had never been decided and that, under *Maher,* the antitrust plaintiff who exacts from the antitrust defendant the commercial favor he wants but ultimately loses on the merits is said to have "prevailed" for attorneys' fee purposes. The question remains: "prevailed" against whom? Southwest has certainly not prevailed against Triple A. Triple A moved for summary judgment on *Noerr-Pennington* grounds, that motion was granted, and no appeal was taken. It has thus been conclu-

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[5] The court below cited this Court's decision in *Maher v. Gagne,* 448 U.S. 122 (1980) to support its ruling that "plaintiff need not obtain formal relief to recover fees" (App. A at 4). *Maher* did hold that a consent decree obtained by plaintiff rendered plaintiff a "prevailing party" under 42 U.S.C. § 1988, but (1) the Court so held in part because the legislative history for § 1988—hardly applicable here—expressly declared that a § 1988 plaintiff has prevailed "when [it] vindicate[s] rights through a consent judgment or without formally obtaining relief" (448 U.S. at 129) and (2) plaintiff in *Maher* did not ultimately lose on the merits—as plaintiff did here.

sively established that Triple A did *nothing* that would entitle Southwest to *anything* under the antitrust laws, attorneys' fees or otherwise. Triple A—not Southwest—"prevailed." All that Southwest obtained from this litigation was a voluntary concession from a defendant that settled. But as the Court of Appeals acknowledged, "[NASSCO]"—*not Triple A*—"voluntarily made the dock available to Southwest Marine through a series of partial assignments" (App. A at 2). The four dissenting judges also declared that NASSCO's partial assignment of its rights "was not an assignment that was authorized, concurred in or in any way made possible by Triple 'A' " (App. G at 29). Circuit Judge Noonan stressed in his earlier concurrence that "Triple A was no party to this concession" and that "[w]hat [Southwest] achieved was achieved through a mistake of law *by NASSCO*" (App. C at 16, 18; emphasis added). There is no legal basis for parlaying a "mistake of law" by NASSCO into a loss on the merits by Triple A.

In holding that Southwest prevailed against Triple A for attorneys' fee purposes, the Court of Appeals' decision also flouts this Court's recent decision in *Kentucky v. Graham*, ____ U.S. ____, 105 S.Ct. 3099 (1985). That is not overstatement. Circuit Judge Noonan, speaking on behalf of four Circuit judges who disapproved the miscarriage of justice condoned by the panel majority, declared that "*Kentucky v. Graham* is of a breadth and weight that makes disregard of its teaching all but direct defiance of the Supreme Court"(App. G at 27).

What is the "teaching" of *Kentucky* which the panel majority defied? It is clear: *Kentucky* holds that an otherwise successful plaintiff cannot recover attorneys' fees from a defendant against whom it did not prevail. The four dissenting Circuit judges correctly recognized that *Kentucky* was directly applicable. Plaintiffs there sued individual defendants (policemen) as well as the Commonwealth of Kentucky for civil rights violations. The District court dismissed the Commonwealth of Kentucky on immunity grounds and plaintiffs thereafter settled with the individual defendants for $60,000. Plaintiffs claimed attorneys' fees against the Commonwealth because they had settled with (and therefore

"prevailed against") the individual defendants—precisely the claim Southwest makes here.

In a unanimous decision written by Justice Marshall, this Court held that plaintiff can only recover attorneys' fees from *a defendant against whom it prevailed.* The Court declared this holding repeatedly as if to leave no room for doubt: Thus: "[I]t is clear that the logical place to look for recovery of fees is to the losing party—the party legally responsible for relief on the merits." *Kentucky*, 105 S.Ct. at 3104. "[L]iability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant." *Id.* at 3105. "That a plaintiff has prevailed against one party does not entitle him to fees from another party." *Id.* at 3106. "[F]ee liability runs with merits liability." *Id.* at 3107. "Section 1988 simply does not create fee liability where merits liability is non-existent." *Id.* "There is no cause of action against a defendant for fees absent that defendant's liability for relief on the merits." *Id.* at 3108. "[F]ee and merits liability run together." *Id.* As declared by Circuit Judges Noonan, Sneed, Goodwin and Anderson, who dissented from the ruling of Circuit Judges Canby and Reinhardt, *Kentucky v. Graham* is so clear as to render the panel majority's recalcitrant error "all but direct defiance of the Supreme Court" (App. G at 27).[6]

The only excuse given by the panel majority for its conscious disregard of this Court's later teaching in *Kentucky v. Graham* was the homage it believed due its own previous error under the "law of the case" rubric. But this Court decided *Kentucky v. Graham* in 1985, a year *after* the Ninth Circuit rendered its "law of the case" at 732 F.2d 744 (9th Cir. 1984). Plainly the law of

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[6] That "merits liability" is the *sine qua non* of "fee liability" is also the necessary holding of a unanimous Court in *Supreme Court of Virginia v. Consumers Union, Etc.*, 446 U.S. 719 (1980). Plaintiffs had there prevailed on the merits of their civil rights suit (42 U.S.C. § 1983) but defendant Supreme Court of Virginia was held immune from merits liability (as was Triple A here) and therefore immune from attorneys's fee liability as well.

the case must yield to the law of the land as enunciated in supervening decisions of this Court. That was made clear in *Arizona v. California*, 460 U.S. 605 (1983), the Court there declaring the "law of the case is an amorphous concept" which merely "directs a court's discretion" but "does not limit the tribunal's power" and should not be invoked if a court is "convinced that it is clearly erroneous and would work a manifest injustice." *Id.* at 618 & n.8. Justice Brennan (dissenting) also declared the "federal courts have traditionally thought that correcting a manifest injustice was reason enough to reconsider" the law of the case. 460 U.S. at 644.[7]

Can there be any doubt about the "error" or the "injustice" here? Triple A not only prevailed but did so by summary judgment because—the District Court held—Triple A could not be held liable under the Sherman Act for having exercised the petition rights guaranteed it by the First Amendment and the *Noerr-Pennington* doctrine. It would surely be a "manifest injustice" to hold, in the name of "law of the case," that a vindicated defendant must nonetheless pay the vanquished plaintiff's attorneys' fees as a price for exercising those constitutional rights.

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[7] The lower courts are equally clear: *Zichy v. City of Philadelphia*, 590 F.2d 503, 508 (3d Cir. 1979) ("This court *has a duty* to apply a supervening rule of law despite its prior decisions to the contrary when the new legal rule is valid and applicable to the issues of the case") (emphasis added); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1190 (5th Cir. 1978) ("Perhaps the most cogent reason possible for not following a previous decision in the same litigation is an intervening decision by the Supreme Court"); *Delano v. Kitch*, 663 F.2d 990, 996 (10th Cir. 1981) (law of the case "*must yield* to a controlling decision between the date of the first ruling and the retrial") (emphasis added); *Crane Co. v. American Standard, Inc.*, 603 F.2d 244, 248 (2d Cir. 1979) (when "a decision of the Supreme Court demonstrates that a ruling on which the judgment would depend was in error, no principle of the 'the law of the case' would warrant a failure on our part to correct the ruling").

III

THE LOWER COURT'S ERROR IS TOO PLAIN, TOO EGREGIOUS AND TOO IMPORTANT TO LET STAND

Triple A fully appreciates that legal error, even flagrant error, is not a sufficient (or even necessary) cause for this Court's issuance of a writ of certiorari. But its petition does not rest on the lower court's error alone. There is more at stake than at issue. Triple A (rather than Southwest) did not "prevail" merely because it did nothing to violate the antitrust laws. It prevailed because it was exercising its First Amendment petition rights, and is now being invoiced plaintiff's attorneys' fees for having done so. Hence the First Amendment is at stake as well. It should not be compromised the way it has been here. In addressing the tension between the First Amendment and the Sherman Act, this Court declared in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11: "We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors."

Addressing the need to subordinate "law of the case" to a just result in a similar First Amendment context, Judge William Schwarzer of the Northern District of California likewise declared in *In Re Airport Car Rental Antitrust Litigation*, 521 F.Supp. 568 (N.D. Cal. 1981), *aff'd*, 693 F.2d 84 (9th Cir 1982): "The implication of First Amendment rights presents a cogent reason for reconsideration where, as here, substantial doubts are raised concerning the validity of plaintiff's claims. *The pendency of a meritless suit can itself chill the exercise of those rights.*" 521 F.Supp. at 573 (emphasis added). Those rights are no less chilled by the prospect that a defendant who exercises them can be forced to fund a meritless suit against it for having done so—merely to show comity for a previous error of the court.

Thus by subordinating clearly applicable Supreme Court authority to plainly erroneous "law of the case," the panel majority

has not *merely* "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Supreme Court Rule 17.1(a). In so doing, it has also trenched upon Triple A's constitutional rights under *Noerr-Pennington*. And, perhaps most importantly for certiorari purposes, it has established a precedent that is potent with harm to all defendants of proven innocence. Henceforth every antitrust plaintiff who sues many and settles with one (which happens often) may be deemed to have "prevailed" merely because—as the Ninth Circuit panel declared—there is "a causal relationship between the litigation brought and the practical outcome realized" (App. A at 4-5). Having "prevailed," that plaintiff would thus be entitled to recover his attorneys' fees from all remaining defendants even though plaintiff ultimately loses on the merits to those defendants—as occurred here.

Whether such a precedent should be allowed to stand, especially where First Amendment rights are implicated, deserves this Court's review. At the least, certiorari should be granted and the matter remanded to the Court of Appeals "for further consideration in light of *Kentucky v. Graham*, 473 U.S. ____, 105 S.Ct 3099, 87 L.Ed.2d 114 (1985)"—precisely as was done in *Alabama Department of Corrections v. Glover*, ____ U.S. ____, 106 S.Ct. 40 (1985). The panel majority's ruling is the only appellate decision ever to construe "prevail" under the Clayton Act, for attorneys' fee purposes, since that Act was passed almost 75 years ago. It should at least be right.

Respectfully submitted,

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(Appendices follow)

Appendix A

Southwest Marine, Inc.,
a California corporation, Plaintiff/Appellant,

v.

Campbell Industries, a California corporation;
San Diego Marine Construction Corp.,
a California corporation; National Steel and Shipbuilding Co.,
a Nevada corporation; Triple A Machine Shop, Inc.,
a California corporation; and San Diego Unified Port District,
a California corporation, Defendants-Appellees.

Southwest Marine, Inc.,
a California corporation, Plaintiff-Appellee,

v.

Campbell Industries,
a California corporation, et. al., Defendants,

National Steel and Shipbuilding Co. and
Triple "A" Machine Shop, Inc.,
Defendants-Appellants.
Nos. 81-5350, 81-5477.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 1, 1982.
Decided May 7, 1984.
As Amended July 11, 1984.

Appeal from the United States District Court for the Southern District of California.

Before FLETCHER, NELSON, and REINHARDT, Circuit Judges.

PER CURIAM:

A drydock facility in San Diego Bay was jointly operated by Campbell Industries, San Diego Marine Construction Corp., Atkinson Marine Corp., Triple A Machine Shop, Inc., and National Steel and Shipbuilding Co. Use of the dock was governed by a written agreement between these parties which re-

stricted use to the signatories. Other companies were granted access to the dock only if they met certain requirements set forth in the User's Agreement.

Arthur Engel had been the general manager of Triple A at the time the User's Agreement was executed. He later left Triple A and became President and Chairman of the Board of Southwest Marine, a competing ship repair company. Southwest Marine was denied access to the dock pursuant to the User's Agreement.

Southwest Marine sued National Steel and Shipbuilding Co. and Triple A Machine Shop, Inc. for injunctive relief and damages, alleging a conspiracy in restraint of trade under section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). After the district court denied the request for injunctive relief, National Steel and Shipbuilding Co. voluntarily made the dock available to Southwest Marine through a series of partial assignments. The damages claim proceeded to trial. The jury, in a special verdict, found for Southwest Marine on the issue of liability, but also found that Southwest Marine was barred from recovering damages by its "truly complete involvement" in the formation of the illegal scheme. Southwest Marine moved for judgment notwithstanding the verdict. The district court denied the motion, entered judgment for the defendants and denied Southwest Marine's motion for injunctive relief and related attorney's fees. Southwest Marine appeals from that denial. Appellees cross-appeal, claiming that because the jury was inadvertently exposed to inadmissible documents, they are entitled to a new trial if we hold for the appellants. Since there was insufficient evidence to support the jury's findings of truly complete involvement, we reverse and remand.

TRULY COMPLETE INVOLVEMENT

To encourage private antitrust actions, the Supreme Court has refused to recognize the defense of *in pari delicto* in antitrust cases. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140, 88 S.Ct. 1981, 1985, 20 L.Ed.2d 982 (1968). The *Perma-Life* Court did not decide, however, whether "truly complete involvement and participation in a monopolistic scheme

could ever be a basis, wholly apart from the idea of *in pari delicto,* for barring a plaintiff's cause of action." *Id.*

This court faced the unresolved issue of *Perma-Life* in *Javelin Corp. v. Uniroyal, Inc.,* 546 F.2d 276 (9th Cir.1976), *cert. denied,* 431 U.S. 938, 97 S.Ct. 2651, 53 L.Ed.2d 256 (1977), holding that a plaintiff is barred from recovery in antitrust only when the illegal conspiracy would not have been formed but for the plaintiff's participation. This test is satisfied when the jury has found that the plaintiff's degree of participation is "equal to that of any defendant and a substantial factor in the formation of the conspiracy." *Id.* at 279.

Plaintiff Southwest Marine, as a corporate entity, was not at all involved in the formation of the User's Agreement. The jury found, however, that Southwest Marine was the alter ego of its president, Arthur Engel. To find Southwest Marine barred from recovering, therefore, the jury must have found that Arthur Engel's personal participation in the conspiracy's formation operated to implicate Southwest Marine indirectly. Given the narrow reach of the *Javelin* defense, we refuse to attribute Engel's acts as a former agent of Triple A to the corporation of which he is now President. We therefore find that *Javelin* does not bar Southwest Marine from recovering against appellees.

ATTORNEY'S FEES

An antitrust plaintiff who "substantially prevails" in an action for injunctive relief is entitled to attorney's fees. 15 U.S.C. § 26 (1976)(as amended). The district court improperly rejected Southwest Marine's petition for attorney's fees for services rendered in attempting to obtain injunctive relief.

The legislative history of the 1976 amendment to section 26 suggests that awards of attorney's fees are essential if private attorneys-general are to enforce the antitrust laws. *See* 1976 U.S. Code Cong. & Admin.News 2572, 2588-90. To permit defendants to avoid the award of attorney's fees in suits for injunctive relief by ceasing their illegal conduct would reduce the incentive to bring suit, thereby frustrating Congress's intent.

A number of district courts that have examined the Section 16 attorney's fees provision have considered the question whether it is proper to infer that Congress intended that the identical language in the section 16 and section 1988 attorney's fees provisions be identically construed. Each of these courts concluded that the "prevailing party" standard was the same under the two statutes. As the court in *Grumman Corp. v. LTV Corp.*, 533 F.Supp. 1385, 1387 (E.D.N.Y.1982), explained, "it is more appropriate to presume that Congress intended [that] identical language found within the Section 16 and Section 1988 attorney's fees provisions, which were enacted by the same Congress, would be identically construed.... This conclusion is corroborated by the negative inference which we draw from an examination of a host of statutes where Congress has expressly imposed the requirement of a final judgment as a condition precedent for plaintiff's recovery of attorney's fees." *See also F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 476 F.Supp. 203, 206 (S.D.N.Y.1979) (relying on case law developed under section 1988 in ruling that [t]he appropriate benchmarks in determining which party prevailed are a) the situation immediately prior to the commencement of the suit, and b) the situation today and the role, if any, played by the litigation in effecting any changes between the two."); *Harnischfeger Corp. v. Paccar, Inc.*, 503 F.Supp. 102, 104-5 (E.D.Wis.1980) (relying on *F.& M. Schaefer* standard in ruling that a party which obtained a preliminary injunction preventing a corporate acquisition alleged to be in violation of the Clayton Act could be considered a prevailing party even though the court never issued a final judgment on the merits).

We have never decided the question whether it is appropriate to apply the standard developed under section 1988 to awards under section 16 of the Clayton Act, and we know of no circuit court that has specifically addressed this question. We do, however, find the reasoning in the cases cited above persuasive and choose to apply the standard for determining a "prevailing party" developed under section 1988 to awards under section 16.

Under 42 U.S.C. § 1988 a plaintiff may be awarded attorney's fees if he is a "prevailing party." In *American Constitutional*

Party v. Munro, 650 F.2d 184 (9th Cir.1981), we held that plaintiff need not obtain formal relief to recover fees. Rather, for there to be a "prevailing party," there must simply be a causal relationship between the litigation brought and the practical outcome realized. *Id.* at 187; *Pomerantz v. County of Los Angeles,* 674 F.2d 1288, 1293 (9th Cir.1982). As a result of the action filed by plaintiff, the defendants decided to permit Southwest Marine to use the dock under an assignment from National Steel and Shipbuilding Co. Thus, whether or not plaintiff ultimately prevails on damages on remand, it has "prevailed" within the meaning of 42 U.S.C. § 1988 (1976). *See Maher v. Gagne,* 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980); *Virginia Academy of Clinical Psychologists v. Blue Shield,* 543 F.Supp. 126, 130 (E.D. Va.1982). The amount of fees ultimately awarded must await final disposition of the suit by the district court.

CONCLUSION

That portion of the special verdict finding truly complete involvement on the part of Southwest Marine is set aside due to insufficient evidence. We remand to the district court to determine whether National Steel and Shipbuilding Co. and Triple A are entitled to a new trial on the issue of liability because the jury was exposed to documents that were not admitted into evidence. If the district court decides that a new trial is not required, Southwest Marine is immediately entitled to a determination of damages, and an award of attorney's fees commensurate with this judgment.

REVERSED and REMANDED.

Appendix B

Southwest Marine, Inc., a corporation,
Plaintiff,

v.

Campbell Industries, a corporation,
Defendants.

Civ. No. 78-0106-G.

United States District Court, S.D. California

July 2, 1985

MEMORANDUM OF OPINION AND ORDER RE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S REQUESTS FOR LEAVE TO FILE SECOND AMENDED COMPLAINT AND FOR ATTORNEY'S FEES

GILLIAM, District Judge.

The court has reviewed the pleadings submitted by the parties and has heard oral argument regarding defendant's motion for summary judgment. After due deliberation, the court grants said motion for the following reasons.

PROCEDURAL STATUS OF THE CASE

This matter proceeded to jury trial in this court in November, 1980. The jury returned a verdict which stated that defendants had concertedly induced the Port District to exclude plaintiff from the graving dock, in violation of the Sherman Act, but that plaintiff was barred from recovery on *pari delicto* grounds.

On plaintiff's appeal, 732 F.2d 744 the Ninth Circuit held that the *pari delicto* defense had not been established, because the record did not provide a legally sufficient basis for imputing Mr. Engel's conduct to the corporation which he formed and controlled.

The case was then remanded to the trial court on May 7, 1984, to determine whether defendants were entitled to a new trial, on the grounds that the jury had been exposed to documents that were not admitted into evidence.

This court considered the issue of a new trial, and issued a written Memorandum of Decisions and Orders re Defendant's Motions for New Trial and Summary Judgment on February 26, 1985. That decision stated that the scope of remand was limited and precluded consideration of the summary judgment motion. The motion for new trial was granted for the reasons set forth therein, that being that the documents submitted to the jury were prejudicial and that the evidence showed that the jury had relied on them for their finding.

Defendants subsequently refiled the instant motion for summary judgment. Plaintiff's petition for writ of mandamus was denied by the Ninth Circuit on April 29, 1985, and the summary judgment motion is now before this court for consideration.

In response to the motion for summary judgment, plaintiff filed a request for leave to file a second amended complaint and a request for attorney's fees under the Ninth Circuit's May 7, 1984 decision.

The dates relevant to the merits of the motions now before this court are as follows:

1978	Defendants sought summary judgment on *Noerr-Pennington* grounds before Judge Nielsen in this district court. The motion was denied at that time, and no written opinion was issued.
1980	Jury trial on the merits.
Nov. 1, 1982	Appeal of the jury trial was argued before the Ninth Circuit and submitted.
Nov. 16, 1982	*In re Airport Car Rental Antitrust Litigation*, 693 F.2d 84 (9th Cir. 1982), cert. denied, was published, declaring new and controlling principles of law affecting the instant case.
Jan. 26, 1983	Petition for rehearing was denied by the Ninth Circuit in *Airport* (supra.)
May 7, 1984	Ninth Circuit opinion was filed, reversing the jury's findings re: *pari delicto* in the instant matter, and remanding to this court.

PLAINTIFF'S REQUEST FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

As ordered at the hearing on these motions, the request of plaintiff for leave to file a second amended complaint is denied.

Plaintiff sought to allege new causes of action which would survive the summary judgment motion now before the court. Allegations of fraud and active participation in a conspiracy with the Port District would survive, because case law has declared that such activity is an exception to *Noerr-Pennington*.

Plaintiff states in its Declaration of Counsel, David E. Lundin, that the reason they have not alleged such a cause of action up to this time is that "there was no need to present facts relating to any exception to the *Noerr-Pennington* doctrine", because governmental immunity was "a fully resolved issue".

The law as it now stands appears to make the protections of *Noerr-Pennington* applicable to this case, and the cause of action upon which plaintiff has solely relied is subject to summary judgment. Plaintiff now seeks to plead itself within two exceptions which have been carved out of the *Noerr-Pennington* right to free speech before a governmental body.

As additional justification for not having alleged these facts earlier, plaintiff asserts that there were various strategic and political reasons which supported that decision.

The most important consideration in the court's determination whether to grant leave to amend under Federal Rule of Civil Procedure 15 is whether there will be any prejudice to the opposing party. Other factors to be considered are whether the motion is timely, what the reasons for delay were, whether the motion is brought in bad faith, the futility of the proposed amendment, and the motivation for bringing the motion at this particular time. *Sackett v. Beaman,* 399 F.2d 884 (C.A.Cal. 1968); *Ozark Air Lines, Inc. v. Delta Air Lines,* 63 F.R.D. 69 (D.C.Ill.1974); *Dow Corning Corp. v. General Elec. Co.,* 461 F.Supp. 519 (D.C.N.Y.1978); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971); *Matlack, Inc. v. Hupp Corp.,* 57 F.R.D. 151 (D.C.Pa.1972).

The amendment which plaintiff urges constitutes a substantial change of the underlying factual allegations. This matter has proceeded completely through one trial on the merits without mention of any fraud or active participation in a conspiracy.

Plaintiff's pleadings indicated the fact that potential allegations of fraud or conspiracy surfaced during discovery some five years ago. All discovery is long ago completed, and the evidence and memories of witnesses have surely dimmed over these seven years since the original complaint was filed. To grant plaintiff's request would require defendants to virtually reconduct discovery in its entirety, and would work a substantial hardship on all parties at this late stage in the proceedings.

The court finds that extending leave to plaintiff to amend its complaint at this stage of the proceedings would substantially prejudice the opposing parties. The court further finds that, as set out below, plaintiff was on notice at all times herein that the law in the area of *Noerr-Pennington* was not settled beyond all doubt so as to necessarily preclude the assertion of the alternative theories of recovery which he now seeks to allege. Finally, the court finds that the timing of the filing of this request evidences bad faith on the part of plaintiffs, in that they appear to be attempting to prevent an anticipated adverse judgment through use of amendment of pleadings.

Finding that the interests of justice would not be served by the amendment, that the request is untimely, that the reasons for delay are without foundation or merit, that the request appears to have been brought at this time for an improper motive, and that the prejudice to defendant caused by this substantial amendment of the underlying factual basis of this litigation will be substantial, the court denies the request of plaintiff for leave to file a second amended complaint.

* * *

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant seeks summary judgment on the basis of a change in existing law, contending that the case of *In re Airport Car Rental Antitrust Litigation*, 693 F.2d 84 (9th Cir.1982), cert. denied, now establishes the principle that *Noerr-Pennington* does protect communications made to a governmental body, even though the

objective of that communication was commercial and anticompetitive.

Plaintiff responds that summary judgment may not be entered at this time because it is barred by the doctrines of *res judicata* and "law of the case", the issue having been decided by Judge Nielsen in 1978.

The court's inquiry is two-tiered. The first determination is whether *Airport* (supra) in fact constitutes a change in the existing law. If there has been no change in existing law, then Judge Nielsen's denial of this same motion in 1978 must be given great deference by this court, and that decision could only be overturned if it were clearly erroneous. If, on the other hand, there has been a change of law, then this court must reconsider the motion in light of that change. Plaintiff's assertion that the law as it exists on the date of filing of the complaint should control throughout the various stages of litigation is without foundation or merit.

The court finds that *Airport* (supra) does constitute a change in existing law. The court in *Airport* undertook an extensive review of previous decisions in this circuit regarding whether or not the *Noerr-Pennington* free speech exemption from the antitrust laws protects concerted efforts to lobby public officials on issues of governmental commercial activities. That full review convinced the Ninth Circuit that previous decisions had erroneously held that governmental decisions which implemented policy, rather than formulated policy, (in other words, commercial activities of the governmental body) were not protected under *Noerr-Pennington*.

Airport specifically halts the former trend of court decisions on this issue, and the stated intention of the court was to clarify and determine this rule of law. For purposes of this motion, then, there has been a change in existing law which is sufficient to require a *de novo* consideration of the issues and which takes this matter out from under the "due deference" standard otherwise accorded to prior decisions between the same parties.

The second inquiry, then, is whether that change of law is applicable to the facts underlying this matter.

The holding in *Airport* (supra) was that the distinction between implementing and formulating policy is not a distinction which sufficiently lessens the interest in free speech so as to avoid the *Noerr-Pennington* doctrine.

Plaintiff draws three distinctions between the facts underlying *Airport* and the facts currently before the court, as follows: 1) The graving dock was owned by the Navy and only leased by the Port District, whereas the governmental body in *Airport* actually owned the land involved. 2) This matter involves execution of a contract, whereas the *Airport* facts involved enactment of governmental policy not in contract form. 3) The act complained of here was not the execution of the contract, but was instead the subsequent refusal to issue a waiver to plaintiff. Under the terms of the contract, that decision was made in conjunction with current users, and was therefore not a purely governmental act.

The court finds that these distinctions are not sufficient to avoid application of the holding in *Airport* to these facts. The cases are substantially identical, and as to those facts which were determinative of the court's ruling, they are the same.

The decision of the Port District to enter into the contract and the decisions as to what the contract provisions would be were made after public meetings were held with an opportunity for full discussion and disclosure. Following those meetings, the matter was referred to a subcommittee for study and recommendation. The subcommittee returned with its report, and the Port District voted unanimously in open, public forum and following further discussion, to execute the contract. This procedure is inherently that of a governmental body, and the course of conduct thereby adopted by the Port District constitutes formulation and implementation of governmental policy.

The fact that the anticompetitive regulations were set out within a contract format instead of in legislative policy format is irrelevant for purposes of this determination. The contract embodies governmental policy. The fact that it is in "contract" form does not vitiate its basic nature, in view of the fact that full compliance with public forum and review requirements was accomplished by the Port District.

This alleged distinction is not sufficient to take this matter outside the purview of *Airport*. Putting the decision into contract form was a mere implementation of policy, and *Airport* specifically states that the distinction between implementation and formulation of policy is not sufficient to avoid *Noerr-Pennington*.

Plaintiff's objection that the land was only leased and not owned outright does not state a determinative fact critical to the holding in *Airport*, and therefore this difference is not sufficient to avoid its dictates.

Plaintiff's third contention, that the act complained of was not execution of the contract initially but was instead the subsequent refusal to issue a waiver of user requirements, is not sufficient to avoid application of the holding in *Airport* to this matter. Again, the contractual provisions were entered into by the Port District after a full and fair governmental formulation of policy, and the execution of the contract itself and subsequent acts taken under the provisions of that contract are merely implementation of that policy. Such acts are specifically sanctioned by the Ninth Circuit in *Airport*.

Finding that the case of *Aiport* (supra) is controlling as to the facts at bar, defendant's motion for summary judgment is granted.

PLAINTIFF'S REQUEST FOR ATTORNEY FEES

Plaintiff seeks attorney's fees in this matter to date under the provisions of the Ninth Circuit's opinion issued May 7, 1984.

In that opinion, the court stated:

> "If the district court decides that a new trial is not required, Southwest Marine is immediately entitled to a determination of damages, and an award of attorney's fees commensurate with this judgment."

The Ninth Circuit's statement that plaintiff should recover its attorney's fees was expressly conditioned on this court's finding that a new trial was not required. As set forth in this court's Memorandum of Decisions filed February 26, 1985, a new trial was found to be required.

Absent the fulfillment of the express condition on which the Ninth Circuit's directive was based, no attorney's fees are due at this time to plaintiff under the dictates of the May 7, 1984 opinion.

Plaintiff's requests for leave to file a second amended complaint and for attorney's fees are denied. Defendant's motion for summary judgment is granted.

IT IS SO ORDERED.

Appendix C

Southwest Marine, Inc., a corporation,
Plaintiff-Appellant,

v.

Campbell Industries, et al.,
Defendants-Appellees.

No. 85-6157.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 11, 1986.

Decided Aug. 5, 1986.

Rehearing Denied Oct. 3, 1986.

Appeal from the United States District Court for the Southern District of California.

Before CANBY, REINHARDT and JOHN T. NOONAN, Jr., Circuit Judges.

PER CURIAM:

In an earlier opinion we held that Southwest Marine was entitled to recover attorneys fees against National Steel and Shipbuilding Company and Triple "A" Machine Shop, Inc., 732 F.2d 744, 746-47 (9th Cir. 1984). We held that Southwest Marine was the prevailing party because of the practical result it had obtained as a result of prosecuting its antitrust action—the right to use a dry dock facility to which it had previously been denied access. This right was afforded to Southwest Marine after the litigation was instituted but prior to trial. The trial resulted in a jury verdict in Southwest Marine's favor but the district judge entered a judgment n.o.v. for defendants. Southwest Marine appealed and we reversed. After deciding that Southwest Marine was entitled to attorney's fees because of the practical result it had obtained prior to the actual trial, we remanded the case for a possible retrial and noted that because a new trial was possible the "amount of fees" should await final disposition of the suit.

Upon remand, as a result of the emergence of new case law affecting the underlying claim, the district court awarded judg-

ment to Triple "A" Machine Shop.[1] (By this time National Steel and Shipbuilding Company had settled with Southwest Marine.) The district judge believed that our decision did not unequivocally resolve the question of Southwest Marine's entitlement to attorneys' fees but that it was conditioned on Southwest Marine's ultimately prevailing in the litigation. That construction of our opinion is erroneous. Our decision constituted a final and unconditional determination with respect to the attorney fee issue. We held unequivocally that Southwest Marine was entitled to recover fees against the defendants. Only the amount of the fees was left unresolved.

We have considered all the other objections raised by Triple "A" and reject them. We note that Southwest Marine's decision to institute litigation was neither frivolous nor unreasonable. To the contrary, its legal position at the time it filed its complaint, as well as at the time it accomplished the practical result that underlay our attorneys' fees determination, was supported by the weight of legal authority.

We express no view as to the amount of legal fees Southwest Marine is entitled to recover or which particular portions of the legal services rendered by its attorneys during the litigation are compensable under our prior decision. Such matters should be considered initially by the district court.

REVERSED AND REMANDED

NOONAN, Circuit Judge, concurring:

The court does not decide which "particular portions" of the legal services rendered Southwest shall be paid for by Triple A. Most people if told you could bring a lawsuit, lose it, and then ask your opponent to pay you at least $363,000 in attorney's fees

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[1] The district court's decision regarding attorney's fees is contained in a published opinion that deals with other issues, including the court's disposition of the case on the merits. *Southwest Marine, Inc. v. Campbell Industries,* 616 F.Supp. 253 (S.D.Cal.1985). Because the attorney's fees decision was published, we are required to publish our reversal of that decision. 9th Cir.R. 21(b)(5). Otherwise we would have issued a memorandum disposition in this case.

would think they had heard a joke or an extravagant parody of the mysterious ways of that old ass, the law. But that is exactly what Southwest Marine has done in this case. It lost at trial. It got a new trial and lost on summary judgment before the second trial began. It lost its motion to amend its pleadings and start again. It has not appealed its defeat which has been mandated by the law. Nonetheless, Southwest has asked for attorney's fees, including fees for work on all the motions it has lost. Chutzpah takes on a new definition when one looks at Southwest's demands.

In February 1978 Southwest sued National Steel and Shipbuilding Company (NASSCO) and Triple "A" seeking access to a dry dock. In May 1978 National granted Southwest a partial assignment of its own rights, giving Southwest the desired access for three years. This assignment was the practical result the lawsuit achieved. Southwest had prevailed against NASSCO to the extent of inducing the three-year assignment. Triple A was no party to this concession.

On appeal, after losing the trial in 1980, Southwest sought attorney's fees from both NASSCO and Triple A. Southwest advanced two arguments: (1) Although Southwest had been awarded zero damages, a special jury verdict had found that the defendants had violated Section 1 of the Sherman Act, and "Counsel for NASSCO admitted that the jury verdict of illegality would be in the mind of his client as well as Triple and the Port," with the result that such verdict would lead to the elimination of the unlawful restraints. (2) The end result had been "to compel the defendants to recognize and honor their obligations under the antitrust laws." Counsel offered no basis for knowing what was in the mind of Triple A and no evidence as to how Triple A had been compelled to recognize and honor its obligations under the antitrust laws. The concession by NASSCO had preceded the verdict that counsel found so salutary. This court, however, in a per curiam opinion ruled: "As a result of the action filed by plaintiff, the defendants decided to permit Southwest Marine to use the dock under an assignment from National Steel and Shipbuilding Co." *Southwest Marine Inc. v. Campbell Industries,* 732 F.2d 744 (9th Cir.1984). The court remanded the case with this directive: "If the district court decides that a new trial is not

required, Southwest Marine is immediately entitled to a determination of damages, and an award of attorney's fees commensurate with this judgment." *Id.* at 744.

On remand, NASSCO settled with Southwest and was dismissed from the case. The district court did decide that a new trial was required. Ultimately Triple A prevailed on a motion for summary judgment. The district court found that Southwest's case was barred by the *Noerr Pennington* doctrine as applied by this circuit in *In re Airport Car Rental Antitrust Litigation,* 693 F.2d 84 (9th Cir.1982) *cert. denied* 462 U.S. 1133, 103 S.Ct. 3114, 77 L.Ed.2d 1368 (1983). The district court denied Southwest's request for attorney's fees, declaring: "The Ninth Circuit's statement that plaintiff should recover its attorney's fees was expressly conditioned on this court's finding that a new trial was not required." *Southwest Marine, Inc. v. Campbell Industries,* 616 F.Supp. 253, 258 (S.D.Cal.1985). Since a new trial had been required, the court concluded that the earlier decision of this court did not mandate the award of the fees.

District courts do not have the authority to override the mandate of this court, but nothing presents a district court from interpreting an ambiguous order in such a way that injustice is avoided. The sentence focused on by the district judge was ambiguous, and the district court sought to interpret the ambiguity to avoid the anomaly of having the winner pay the loser's lawyers. But the district court isolated a single sentence from the discussion by this court that made it plain that Southwest was in its view the prevailing party against "the defendants" in the plural.

Southwest, then, by the law of the case is entitled to attorney's fees, but at no point has this court determined that it is entitled to all its attorney's fees. Southwest is not entitled to attorney's fees for work done by its lawyers that bore no fruit whatsoever. *Hanrahan v. Hampton,* 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980).

Recognizing that "a request for attorney's fees should not result in a second major litigation" and that the district court has discretion to determine fees to be awarded, the Supreme Court

has laid out principles to govern this determination in all cases where Congress has authorized such an award to a "prevailing party." *Hensley v. Eckerhart,* 461 U.S. 424, 433 n. 7, 103 S.Ct. 1933, 1939 n. 7, 76 L.Ed.2d 40. Where a plaintiff "has succeeded on only some of his claims for relief," the district court may adjust the fee downwards. *Id.* at 434, 103 S.Ct. at 1940. Work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved." *Id.* at 435, 103 S.Ct. at 1940. What is "the most critical factor" is "the degree of success obtained." *Id.* at 436, 103 S.Ct. at 1941. "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Id.* at 440, 103 S.Ct. at 1943.

Southwest prevailed to the extent of getting a partial assignment for three years from NASSCO. That assignment and the entire Users' Agreement expired on July 2, 1981 and were not renewed. This court has not held that the nonrenewal of that agreement was in any way attributable to Southwest's suit. Indeed as that suit turned out, it would be entirely legal for the old Users' Agreement to be reinstated. The *public* benefit was zero or negative. In this respect the case is markedly different from civil rights cases where a plaintiff acting as a private attorney general vindicates fundamental rights. *Cf. City of Riverside v. Rivera,* ____ U.S. ____, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986). Southwest won no permanent victory. Southwest did not vindicate the antitrust laws. What it achieved was achieved through a mistake of law by NASSCO. Southwest's attorney's fees should be awarded in the light of this small victory. A portion of the first appeal and all of this appeal was dedicated to vindicating the claim to these attorney's fees. Consequently, work here may also be appropriately compensated to the extent warranted by the result obtained.

With these clarifications I concur in the disposition made by the court.

Appendix D

United States Court of Appeals
For the Ninth Circuit

No. 85-6157
D.C. No. CV 78-0106-G

FOR PUBLICATION

Southwest Marine, Inc., a corporation,
Plaintiff-Appellant,

vs.

Triple "A" Machine Shop, Inc., a corporation,
Defendant-Appellee.

Opinion Re Rehearing
[Filed Oct. 3, 1986]

Appeal from the United States District Court
for the Southern District of California
Earl B. Gilliam, United States District Judge, Presiding

Argued and Submitted July 11, 1986, Pasadena, California
Decided August 5, 1986

Before: CANBY, REINHARDT and NOONAN, Circuit Judges

The petition for rehearing is denied. Triple A Machine Shop's reliance on *Kentucky v. Graham,* ____ U.S. ____, 105 S.Ct. 3099 (1985), is misplaced. *Graham* held only that a government entity cannot be held liable in an action against a government official in his personal capacity. The decision in no way alters or affects the basic rule that a prevailing party may be awarded attorney's fees pursuant to Section 1988. Most important of all, the Court expressly disavowed any intent to change the current law with respect to the criteria for, or definition of, a "prevailing party". As the Court explicitly said: "We express no view as to the nature or degree of success necessary to make a plaintiff a prevailing party. *See Maher v. Gagne,* 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980)." 105 S.Ct. at 3105 n.9.

Thus the law of the case, *Southwest Marine v. Campbell Industries,* 732 F.2d 744 (9th Cir. 1985), remains applicable. Moreover, in our view, that law was properly decided. For reasons stated in the above cited opinion, *Southwest Marine* was the prevailing party.

FOR PUBLICATION

[Filed Oct. 3, 1986]

Southwest Marine, Inc.
v.
Triple "A" Machine Shop
No. 85-6157

NOONAN, Circuit Judge, dissenting:

Appellant's right to some attorney's fees was upheld by this court in an opinion filed August 5, 1986. The basis for the decision was that this court had so held in an earlier phase of this litigation. *Southwest Marine I,* 732 F.2d 744, 746-47 (9th Cir. 1984). I concurred because I believed that the law of the case controlled.

After the 1984 decision and before the 1986 decision, the Supreme Court decided *Kentucky v. Graham*, 105 S. Ct. 3099 (1985). The Court was careful to say that it was not deciding what degree of success made a plaintiff a prevailing party but it did decide when a defendant was not a losing party. The express teaching of that case is "that the logical place to look for recovery of fees is to the losing party"—the party which is "legally repsonsible for relief on the merits." *Id.* at 3104. The Court further declared that there is "no cause of action against a defendant for fees absent that defendant's liability for relief on the merits." *Id.* at 3108. The heart of Justice Marshall's opinion for the Court is that "fee and merits liability run together. " *Id.* at 3108.

Kentucky v. Graham deals with fees under 42 U.S.C. § 1988, but it was clearly established in *Southwest Marine I* that we apply case law construing this section to the attorney fee provisions of 15 U.S.C. § 26. *See* 732 F.2d 744, 746. In the light of *Kentucky v. Graham* it is evident that this court's award of attorney's fees in 1984 to Southwest Marine was a mistake of law. Normally the law of the case controls, and litigation on settled points cannot be continually renewed. Due to the particular facts of this case, litigation has continued, and we are in a position to correct the mistake made in 1984. A long line of precedent teaches that an

appellate court should not be barred by the law of the case from correcting a decision which is ultimately seen to be mistaken because of an intervening treaty, statute, or relevant judicial decision. Rather, when the law changes, "the law must be obeyed, or its obligation denied." *The Peggy*, 1 Cranch 103, 110 (per Marshall, C.J.); *see also Linkletter v. Walker*, 381 U.S. 618, 627 (1965); *Vanderbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 542 (1941). The law is clear "that if, before a case in a district court has proceeded to final judgment, a decision of the Supreme Court demonstrates that a ruling on which the judgment would depend was in error, no principle of 'the law of the case' would warrant a failure on our part to correct the ruling." *Zdanak v. Glidden Co.*, 327 F.2d 944 (2d Cir. 1964) (per Friendly, J.). *See also Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) (per Friendly, J.).

Triple "A" was not the losing party in the sense defined by the Supreme Court. The concession made by its co-defendant was due to another mistake of law. In no sense was Triple "A" "legally responsible for relief on the merits." It had no "merits liability." It should pay nothing now. The contrary decision of this court is in accordance with the law of the case but it is contrary to law.

Appendix E

United States Court of Appeals
For the Ninth Circuit

No. 85-6157
DC# CV 78-0106-G(M)

Southwest Marine, Inc.,
Plaintiff-Appellant,

vs.

Campbell Industries, et al.,
Defendants-Appellees.

Order

[Filed Oct. 22, 1986]

Before: CANBY, REINHARDT, and NOONAN, Circuit Judges.

The mandate issued on October 15, 1986 is recalled. The Opinion re Rehearing filed on October 3, 1986 is vacated.

Appendix F

Southwest Marine, Inc., a corporation,
Plaintiff-Appellant,

v.

Campbell Industries, a corporation, et al.,
Defendants,

Triple "A" Machine Shop, Inc., a corporation,
Defendant-Appellee.

No. 85-6157

United States Court of Appeals,
Ninth Circuit

Argued and Submitted July 11, 1986.

Decided Dec. 16, 1986.

Before CANBY, REINHARDT and NOONAN, Circuit Judges.

ORDER AMENDING OPINION

The opinion filed in this case on August 5, 1986, 796 F.2d 291, is amended as follows:

A footnote is added at p. 292, 1st col. line 7 from bottom of text, after "defendants." and before "Only the amount". The note reads:

> 2. In the original action, Southwest Marine alleged that National Steel and Triple "A" conspired with others to deny Southwest Marine access to the dry dock and sought damages against both. Although the actual assignment of the right to use the dry dock was made by National Steel, we found that it was the defendants collectively, including Triple "A", who decided to permit Southwest Marine to use the facility. 732 F.2d at 747. In short, it was the defendants collectively, including Triple "A", who, as a result of Southwest Marine's prosecution of its action, removed the allegedly unlawful obstacle to Southwest Marine's enjoyment of its claimed rights. For that reason, we held in our earlier opinion that Southwest Marine had prevailed against Triple "A" as well as National Steel.

Appendix G

Southwest Marine, Inc., a corporation,
Plaintiff-Appellant,

v.

Campbell Industries, a corporation, et al.,
Defendants,

Triple "A" Machine Shop, Inc., a corporation,
Defendant-Appellee.

No. 85-6157.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 11, 1986.

Decided Feb. 25, 1987.

Before CANBY, REINHARDT and NOONAN, Circuit Judges.

ORDER

Triple "A" Machine Shop's suggestion for en banc consideration is rejected. A vote was taken, but a majority of the active judges were not in favor of en banc consideration.

OPINION

REINHARDT, Circuit Judge:

The petition for rehearing is denied. Triple "A" Machine Shop's reliance on *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), is misplaced. *Kentucky v. Graham* held only that a government entity cannot be held liable in an action against a government official in his personal capacity. The decision in no way alters or affects the basic rule that a prevailing party may be awarded attorneys' fees pursuant to Section 1988. Most important of all, the Court expressly disavowed any intent to change the current law with respect to the criteria for, or definition of, a "prevailing party". As the Court explicitly said: "We express no view as to the nature or degree of success necessary to

make a plaintiff a prevailing party. *See Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980)." 105 S.Ct. at 3105 n. 9.

Thus the law of the case, *Southwest Marine v. Campbell Industries*, 732 F.2d 744 (9th Cir.1985), remains applicable. Moreover, in our view, that law was properly decided. For reasons stated in the above cited opinion, *Southwest Marine* was the prevailing party.

NOONAN, Circuit Judge, with whom GOODWIN, SNEED, and J. BLAINE ANDERSON, Circuit Judges, join dissenting from the denial of en banc rehearing:

The opinion of the court in this case is defensible if either of the following propositions is valid:

> 1. A losing litigant is entitled to be paid his attorneys' fees by the winning litigant.
>
> 2. Once a court makes a serious mistake, the court should not correct the mistake, even though its error is called to its attention and the litigation is still in progress.

The present case treats the award of fees under the antitrust laws, 15 U.S.C. § 26, as parallel to awards under 42 U.S.C. § 1988. In *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) a unanimous decision of the Supreme Court, Justice Marshall writing for the Court made a number of statements on court-awarded attorneys' fees under 42 U.S.C. § 1988,—statements which very strictly read could be taken as dicta but which form the warp and woof of the Court's reasoning and which, because of the precedential force of § 1988 cases, are highly relevant here. *Kentucky v. Graham* is of a breadth and weight that makes disregard of its teaching all but direct defiance of the Supreme Court.

In *Kentucky v. Graham*, Justice Marshall for the Court wrote:

> . . . It is clear that the logical place to look for recovery of fees is to the losing party—the party legally responsible for relief on the merits.

Id. at 3104.

Justice Marshall also wrote:

> That a plaintiff has prevailed against one party does not entitle him to fees from another party, let alone from a non-party.

Id. at 3106.

Justice Marshall further wrote:

> . . . fee and merits liability run together.

Id. at 3108.

In the present case, recovery of fees had been looked to in the illogical place—the winning party, the party found to be not responsible for relief on the merits.

In the present case, the plaintiff prevailed against one party by means of settlement and is now awarded fees from another party which did not settle, a party which in fact did prevail against the plaintiff.

In the present case, fee and merits liability do not run together, but liability for the fee is attached to a defendant that has won on the merits.

The only conceivable justification for this bizarre result is that the law of the case in an earlier phase of this litigation had established that the victorious defendant should be liable. In the earlier phase, a per curiam opinion stated that "the defendants decided to permit Southwest Marine to use the dock under an assignment from National Steel & Shipbuilding Co." *Southwest Marine, Inc. v. Campbell Industries,* 732 F.2d 744, 747 (9th Cir.1984) The opinion went on to say that the plaintiff had "prevailed within the meaning of 42 U.S.C. § 1988." The implication of the opinion was that the plaintiff had prevailed against both defendants.

Two major difficulties exist in treating the law of the case thus set out as binding now:

First, the law of the case is not binding when the law changes. *Kentucky v. Graham* clarified the law of court-awarded attorneys' fees in such a way that it should be read as changing the law

subsequent to this court's earlier decision. Accordingly, the earlier opinion should give way.

Second, the law of the case does not have the same binding force as *res judicata*. As Justice Holmes succinctly put it:

> In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.

Messenger v. Anderson, 225 U.S. 436, 444, 32 S.Ct. 739, 740, 56 L.Ed. 1152 (1912). The difference between the law of the case and *res judicata* is that "one directs discretion, the other supersedes it and compels judgment." *Southern Railway Co. v. Clift*, 260 U.S. 316, 319, 43 S.Ct. 126, 127, 67 L.Ed. 283 (1922).

We are dealing with what is properly a matter of discretion—discretion so vague that the law of the case has been described by the Supreme Court as "an amorphous concept." *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983). It is essentially "a rule of practice and not a limit on authority." 1 B. J. Moore, J. Lucas, & T. Currier, *Moore's Federal Practice* § 0.404[1] at 120 (2d ed. 1982). Specifically, to correct "a manifest injustice" the law of the case should be reconsidered. *Arizona v. California*, 460 U.S. at 644, 103 S.Ct. at 1404 (Brennan, J., dissenting). Law of the case should not be applied woodenly in a way inconsistent with substantial justice. *Moore v. James H. Matthews & Co.*, 682 F.2d 830, 833-34 (9th Cir.1982).

A substantial miscarriage of justice is involved in this case. The single sentence speaking of "the defendants" in the plural is based on this court's erroneous impression that the defendants had some kind of joint control over the dry docks. In fact, the users' agreement was between the San Diego Port Authority and a series of independent shipbuilders. No one of these shipbuilders acted on behalf of all the other shipbuilders. The assignment made by National Steel & Shipbuilding Co. to Southwest Marine was not an assignment that was authorized, concurred in or in any way made possible by Triple "A". There was no way that the

defendants could "collectively" permit Southwest Marine to use the facility.

In its brief on appeal in this case, Triple "A" made crystal clear the error which the court's earlier opinion had made. For reasons that are not apparent, the court has been unwilling to acknowledge that the earlier panel committed an error of fact and it has been unwilling to rectify the miscarriage of justice based on the error of fact. Indeed, in footnote 2 of the present opinion, the court has chosen to repeat the original error. On this appeal Southwest Marine did not attempt to dispute Triple "A"s refutation of this mistake. The court nonetheless still seems to recite the error as fact.

The final liability to be imposed by the district court is as yet undetermined. Whether it is ultimately small or large (the losing plaintiff has asked for over $350,000 in fees) is not decisive. Justice is too precious a commodity to have a price. Even if the ultimate fee awarded should be small, we should not so turn things on their head that the winner becomes the loser, nor, out of charity for the mistakes of this court, should we turn a blind eye when the court itself is the instrument of injustice.

Appendix H

Statutory Provisions Involved

15 U.S.C. § 15 states:

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 26 states:

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.